

1 **BEFORE THE DEPARTMENT OF**
2 **NATURAL RESOURCES AND CONSERVATION**
3 **OF THE STATE OF MONTANA**

4 * * * * *

IN THE MATTER OF APPLICATION NO. 76H)
30012871 TO CHANGE WATER RIGHT CLAIM)
NOS. 76H 105194-00, 76H 107548-00, 76H) **FINAL ORDER**
107549-00, 76H 212610-00 BY GARY AND)
RAMONA EVANS)

5 * * * * *

6 Pursuant to the Montana Water Use Act and to the contested case provisions of the
7 Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-
8 307, a hearing was held on April 26, 2007, in Darby, Montana, to determine whether an
9 authorization to change a water right should be issued to Gary and Ramona Evans, hereinafter
10 referred to as "Applicant" for the above application, under the criteria set forth in Mont. Code
11 Ann. § 85-2-402(2). All water rights involved in the change application were listed in the required
12 public notice. The Water Right Claims proposed for change are Claim Nos. 76H 105194-00,
13 76H 107548-00, 76H 107549-00, and 76H 212610-00.

14 **APPEARANCES**

15 Applicant Gary and Ramona Evans appeared at the hearing by and through counsel,
16 David Markette. Gary Evans and Sherry Wildey were called to testify by the Applicant.

17 Objector Tin Cup Water and/or Sewer District (hereafter "Tin Cup") appeared at the
18 hearing by and through counsel, W. Carl Mendenhall. Tex Marsolek, Assistant General
19 Manager, Tin Cup Water and/or Sewer District, testified for Objector Tin Cup.

20 **EXHIBITS**

21 Both Applicant and Objectors offered exhibits for the record. The parties stipulated to the
22 admittance of the Applicant Exhibit Nos. 1-26, 28-29, and Objector Tin Cup Exhibit Nos. TC075-
23 079. Exhibits A27, A30, TC063, and TC073 were introduced after the stipulation and were
24 admitted. The exhibits are admitted into the record to the extent noted below. Applicant offered
25 30 exhibits for the record. The Hearing Examiner accepted and admitted into evidence
26 Applicant's Exhibit Nos. A1-A30.

27 **Applicant's Exhibit A1** is a twenty-one page copy of the Application.

1 **Applicant's Exhibit A2** is a one-page copy of an *Acknowledgement of Water Right*
2 *Transfer* for Water Right No. 76H – W-105194-00 showing Russell and Sherry Wildey as
3 owners of the water right.

4 **Applicant's Exhibit A3** is a one-page *Abridged Summary* of Water Right No. 76H
5 105194-00 dated 10/28/04.

6 **Applicant's Exhibit A4** consists of a ten-page copy of Water Right Claim Nos. 76H
7 107549-00 and 76H 107548-00, including a copy of a portion of Case No. 4964, Paragraph
8 XXXVIII, and other attachments.

9 **Applicant's Exhibit A5** is a three-page copy of the DNRC *Examination Worksheet* for
10 Water Right Claim No. 76H 107549-00.

11 **Applicant's Exhibit A6** is a three-page copy of *Amendment* of Water Right Claim No.
12 76H 107549-00 received by DNRC on October 25, 1991.

13 **Applicant's Exhibit A7** is a two-page copy of the DNRC *Review Abstract* for Water
14 Right Claim No. 76H 107549-00.

15 **Applicant's Exhibit A8** is a two-page copy of the *Temporary Preliminary Decree,*
16 *Abstract of Water Right*, Water Right No. 76H 107549-00 dated 4/11/94.

17 **Applicant's Exhibit A9** is a two-page copy of a *Notice Of Objection And Request For*
18 *Hearing* filed with the Montana Water Court for Water Right No. 76H 107549-00 filed by Tin Cup
19 Water Company.

20 **Applicant's Exhibit A10** is a three-page copy of the *Master's Report* in Case No. 76HE-
21 232, 76H-W-107549-00 in which the maximum acres irrigated shown on the Temporary
22 Preliminary Decree abstract of Water Right Claim No. 76H 107549-00 is changed to read 7
23 acres.

24 **Applicant's Exhibit A11** is a two-page copy of the *ORDER ADOPTING MASTER'S*
25 *REPORT* in Case No. 76HE-232 dated July 30, 1997.

26 **Applicant's Exhibit A12** is a two-page copy of the *Abstract of Water Right Claim as*
27 *modified by the Water Court* for Water Right No. 76H 107549-00.

28 **Applicant's Exhibit A13** is a two-page copy of a *Quit Claim Deed (Water Rights)* dated
29 May 24, 2001, between Russell and Sherry Wildey and Gary and Ramona Evans.

30 **Applicant's Exhibit A14** is a one-page copy of a *DNRC Water Right Ownership Update*
31 and a two-page copy of an *Acknowledgement of Water Right Ownership Update* both including
32 Water Right No. 76H 107549-00 from Russell and Sherry Wildey to Gary and Ramona Evans.

1 **Applicant's Exhibit A15** is a four-page copy of *Objection To Application* filed by Tin
2 Cup Water and/or Sewer District to Application No. 76H 30012871 by Gary and Ramona Evans.

3 **Applicant's Exhibit A16** is a fourteen-page copy *Notice of Filing of Master's Report* RE:
4 Case No. 76HE-261; Water Right Claim Nos. 76H-B-212310, 76H-B-212610-00 filed December
5 23, 2004.

6 **Applicant's Exhibit A17** consists of two pages of easements between Gary and
7 Ramona Evans and Bret and Krista Hale, and Douglas and Ellen Hoblitt.

8 **Applicant's Exhibit A18** is a four-page letter from Gary Evans to Patrick Ryan (DNRC)
9 dated January 30, 2006.

10 **Applicant's Exhibit A19** is a twelve-page copy of a letter with attachments from Tin Cup
11 Water and/or Sewer District to Patrick Ryan (DNRC) dated February 8, 2006.

12 **Applicant's Exhibit A20** is a one-page copy entitled *RAVALLI COUNTY Property Print*
13 *2007* dated 3/9/07.

14 **Applicant's Exhibit A21** is a one-page copy of a map showing a pipeline location from
15 Mill Ditch to the Evans property.

16 **Applicant's Exhibit A22** is a one-page March 9, 2007 letter from Gary Evans to Dave
17 Markette regarding water rights, equipment and water usage on Evans Property.

18 **Applicant's Exhibit A23** is a seven-page copy of Cornell® Pump Company information.

19 **Applicant's Exhibit A24** is a two-page copy of an affidavit of Clifford Buhler signed on
20 February 6, 2006.

21 **Applicant's Exhibit A25** is a four-page copy of the Scott Boulanger *Objection To*
22 *Application No. 76H 30012871*.

23 **Applicant's Exhibit A26** is a three-page copy of a letter from Gary Evans to Larry and
24 Sandra Rose, Scott Boulanger, Kristi Schmidt, and James Ralston dated January 22, 2007.

25 **Applicant's Exhibit A27** is a three-page copy of a summary of DNRC records (compiled
26 by Gary Evans) entitled *MILL DITCH OWNERSHIP APRIL 20, 2006*. The 474.9 miner's inch
27 (MI) claimed diversion at the headgate was reduced to 426 MI in the Temporary Preliminary
28 Decree by subtracting the bolded amounts which were not claimed in the state-wide water right
29 adjudication.

30 **Applicant's Exhibit A28** is a four-page copy of the Kristi Schmidt *Objection To*
31 *Application No. 76H 30012871*.

32 **Applicant's Exhibit A29** is a four-page copy of the James Ralston *Objection To*
33 *Application No. 76H 30012871*.

Applicant's Exhibit A30 is a large one-page map showing Mill Ditch and surrounding area.

Objector Tin Cup offered 7 exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector Tin Cup's Exhibit Nos. TC063, TC073, TC075, TC076, TC077, TC078, TC079.

Objector Tin Cup Exhibit No. TC063 is a one-page copy of a portion of the “1933 Decree” map showing a portion of Mill Ditch.

Objector Tin Cup Exhibit No. TC073 is a large color copy of a 2005 NRCS [Natural Resources and Conservation Service] aerial photograph which shows the 1933 Decree water conveyance in red dashes and some property ownerships in red marked by Tex Marsolek.

Objector Tin Cup Exhibit No. TC075 is a one-page copy of a photograph of buildings near the Wildey property.

Objector Tin Cup Exhibit No. TC076 is a one-page copy of a photograph of buildings near the Wildey property.

Objector Tin Cup Exhibit No. TC077 is a one-page copy of a photograph of buildings near the Wildey property.

Objector Tin Cup Exhibit No. TC078 is a one-page copy of a photograph of buildings near the Wildey property.

Objector Tin Cup Exhibit No. TC079 is a one-page copy of a photograph of buildings near the Wildey property.

PRELIMINARY MATTERS

At the beginning of the hearing, Applicant withdrew Water Right Claim No. 76H 212610-00 (112.2 gpm¹) from consideration under this change application. Thus, the changes proposed are for the place of use of Water Right Claim Nos. 76H 105194-00, 76H 107548-00, and 76H 107549-00.

Objectors Rose, Boulanger, Schmidt, and Ralston did not appear at the hearing. At the close of the hearing Applicant moved that these Objectors be found in default and their objections be dismissed. The Hearing Examiner found the parties to be in default. The Hearing Examiner **GRANTED** the motion and dismissed their objections in this matter. Objector Rose, Objector Boulanger, Objector Schmidt, and Objector Ralston are no longer parties in this matter.

¹ 112.2 gpm = 10 Miners Inches (MI)

1 Applicant and Objector Tin Cup provided a written stipulation of facts dated April 26,
2 2007. A copy of the two-page stipulation (hereinafter, "Stipulation") is attached beginning on
3 page 21.

4 Parties each retained their large exhibit offered at hearing (Applicant, A30; Objectors,
5 TC073) to make copies for each other; the original was then mailed to the Hearing Examiner.
6 The Hearing Examiner has received the originals and placed them in the Department file.

7 The Hearing Examiner, having reviewed the record in this matter and being fully advised
8 in the premises, does hereby make the following:

9 **FINDINGS OF FACT**

10 **General**

11 1. Application To Change A Water Right No. 76H 30012871 in the name of and signed by
12 Gary and Ramona Evans was filed with the Department on October 29, 2004. (Department file)

13 2. A public notice describing facts pertinent to this application was published in the *Ravalli*
14 *Republic*, a newspaper of general circulation on September 16, 2005, and was mailed to
15 persons listed in the Department file on September 14, 2005. (Department file)

16 3. The Environmental Assessment (EA) prepared by the Department for this application,
17 dated May 17, 2005, was reviewed and is included in the record of this proceeding. (Department
18 file)

19 4. Applicant withdrew Water Right Claim No. 76H 212610-00 (112.2 gpm) from
20 consideration under this change application. The noticed change included Water Right Claim
21 Nos. 76H 212610-00, 76H 105194-00, 76H 107548-00, and 76H 107549-00. Thus, the
22 remaining changes proposed are for the place of use of Water Right Claim Nos. 76H 105194-
23 00, 76H 107548-00, and 76H 107549-00. The modified application is a subset of the original
24 application. (Stipulation, testimony of Gary Evans)

25 5. Applicant proposes to change the place of use of Water Right Nos. 76H 105194-00, 76H
26 107548-00, and 76H 107549-00 to approximately 9 irrigated acres of the Applicant's 10 acre
27 property located in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, Township 3 North, Range 21 West,
28 Ravalli County, Montana. The entire area, flow rate, and volume being changed for each water
29 right is as follows: 76H 105194-00, 44.88 gallons per minute² (gpm), up to 12 acre-feet, on 3.9

² 44.88 gpm = 4 Miners Inches (MI)

acres for irrigation; 76H 107549-00, 123.42 gpm³, up to 30 acre-feet, on 7 acres for irrigation; and 76H 107548-00, up to 0.17 acre-feet, for 10 head of beef cattle. The new place of use is near the existing Mill Ditch. Under the proposal diversion from Tin Cup Creek into the Mill Ditch will continue, and the water will be diverted from the Mill Ditch by Applicant using a secondary point of diversion at an existing pump and mainline currently in use by other water rights owned by the Applicant. (Department file, testimony of Gary Evans)

6. The irrigation water rights proposed for change in this application are supplemental to each other and to the additional water rights in the following table. Supplemental means they are combined for use on the same place of use as other water rights using the secondary point of diversion and existing pump on Mill Ditch. The irrigation water rights which are supplemental and are used on all or portions of the 9 acre place of use located in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, Township 3 North, Range 21 West include:

<u>WR Number</u>	<u>Source</u>	<u>Flow Rate</u>	<u>Volume, acre-feet</u> ⁴
76H-105194	Tin Cup Creek	44.88 gpm (4 MI)	12
76H-107549	Tin Cup Creek	123.42 gpm (11 MI)	30
76H-212310 ⁵	UT Bitterroot River	(170 gpm) (15.15 MI)	
76H-30404-01	Tin Cup Creek	40.39 gpm (3.6 MI)	
76H-107471	Tin Cup Creek	13.46 gpm (1.2 MI)	
76H-108983 ⁶	Tin Cup Creek	60.83 gpm (5.42 MI)	
Total:		282.98 ⁷	

(Department filed, Exhibit No. A18)

7. The amount of water proposed for change is within the amounts of Applicant's Water Right Claims in the Temporary Preliminary Decree. (Department file, testimony of Gary Evans)

³ 123.42 gpm = 11 MI

⁴ The only volumes are those identified by the Applicant as those being changed in this matter; those remaining have no volumes identified on the Water Right General Abstract.

⁵ This is a late filed claim, and is for an Unnamed Tributary of the Bitterroot River, not for Tin Cup Creek water.

⁶ This water right has four owners: Town of Darby, Gary and Ramona Evans, and Spigot Resources, Inc. Applicant share of flow rate is 60.83 gpm for use on 5.42 acres.

⁷ Only Tin Cup Creek flow rates included in the total.

1 8. During the adjudication process in 1995, no objection [to the Temporary Preliminary
2 Decree] was filed for Water Right Claim No. 76H 105194-00, and the claim was approved as
3 shown on the Statement of Claim. (Stipulation)

4 9. Tin Cup filed objections [to the Temporary Preliminary Decree] to Water Right Claim
5 Nos. 76H 107548-00 and 76H 107549-00 [in the adjudication process] on numerous grounds,
6 including on the ground of abandonment. Following a second status conference [Montana
7 Water Court] conducted in Case No. 76HE-232 (Water Right Claim No. 76H 107549) in July
8 1997, Tin Cup agreed to withdraw its objections, and entry of judgment confirming Water Right
9 Claim No. 76H 107549-00 provided the maximum acreage be reduced from 11 to 7 acres for
10 this Claim. An order adopting the Water Master's Report on the terms agreed to by Tin Cup was
11 filed on July 31, 1997. (Stipulation)

12 10. The summarized elements of Water Right Claim No. 76H 105194-00 as it stands prior to
13 this Application : Source = Tin Cup Creek; Priority Date = April 1, 1884; Type of Right =
14 Decreed; Maximum flow rate = 44.88 gpm (4 MI); Maximum acres = 3.9; Point of diversion =
15 SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 22, Township 3 North, Range 21 West, Ravalli County, Montana;
16 Place of use = NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 North, Range 21 West, Ravalli County,
17 Montana. (Department file)

18 11. The summarized elements of Water Right Claim No. 76H 107549-00 as it stands prior to
19 this Application: Source = Tin Cup Creek; Priority Date = April 1, 1884; Type of Right =
20 Decreed; Maximum flow rate = 123.42 gpm (11 MI); Maximum acres = 7; Point of diversion =
21 SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 22, Township 3 North, Range 21 West, Ravalli County, Montana;
22 Place of use = E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 North, Range 21 West, Ravalli County,
23 Montana. (Department file)

24 12. The Wildeys purchased the property with water rights in Section 2 in 1976 and filed
25 Water Right Claim Nos. 76H 107548-00 and 76H 107549-00 for that property. In 1991 the
26 Wildeys purchased the McChesney property with water rights. An acknowledgment of water
27 right transfer for the McChesney Water Right Claim No. 105194-00 claim was filed in December
28 1991. Applicant purchased these water rights from Russell and Sherry Wildey in 2001.
29 (Testimony of Sherry Wildey, Stipulation)

30 **Historical Use**

31 13. The water rights to be changed are: Water Right Nos. 76H 105194-00, 76H 107548-00,
32 and 76H 107549-00. The Wildey property had irrigation ditches in use when the Wildeys moved

1 onto the property, and all of these water rights were used for the production of native grasses
2 for hay and grazing or drinking water for livestock. The portion of Case No. 4964 provided with
3 the Wildey Claims states that 32 inches of water is necessary for the proper irrigation of
4 Wildey's predecessor's (Claude Hopkins) 32 acres and that the water has been continuously
5 used on the land for irrigation and other purposes since April 1, 1884. After moving onto the
6 property, the Wildeys never cleaned the ditches or used the water on their property. In the years
7 they owned the property they did not enforce or use the ditch easement. There is evidence that
8 the Mill Ditch upgradient of the Wildey place of use has since been filled in. However, annual
9 water commissioner reports submitted to the district court show the Water Commissioner has
10 diverted this water down the Mill Ditch. (Department file; testimony of Gary Evans; Sherry
11 Wildey; Exhibit No. A18, page 3; Tex Marsolek, Exhibit No. TC075)

12 14. The Wildeys also owned the property and associated stock water and irrigation rights as
13 shown on Water Right Claim Nos. 76H 107548-00 and 76H 107549-00. The water associated
14 with such claims continues to be diverted through Mill Ditch to this day and the ditch
15 assessments have been paid. There are no Mill Ditch Association assessments in arrears for
16 the Wildey water rights. Objector Tin Cup has not been able to benefit from the non-use of this
17 water right because the water has continuously been diverted into Mill Ditch. (Department file,
18 Stipulation, testimony of Gary Evans, Tex Marsolek)

19 15. In 1981 Harold McChesney filed a Statement of Claim for decreed water from Tin Cup
20 Creek for 3.9 irrigated acres, 4 miner's inches, using Mill Ditch to convey the water to his land.
21 Wildeys purchased that property from McChesney, along with the claimed water right (76H
22 105194-00), in 1991. (Stipulation)

23 16. Water associated with Water Right Claim No. 76H 105194-00 continues to be diverted
24 through Mill Ditch to this day. Objector Tin Cup has not been able to benefit from the non-use of
25 this water right because the water continues to be diverted into Mill Ditch. This water has been
26 used by the Applicant since 2001 at the proposed 9 acre place of use. Where it was used at all
27 other times it has been diverted into Mill Ditch is not known. (Stipulation, testimony of Tex
28 Marsolek)

29 17. The historic crop of native grasses for hay and grazing on 10.9 acres (7ac + 3.9 ac)
30 under the Water Right Claims is the same as the proposed crop at the proposed 9 acre place of
31 use. There will be no increase in consumptive use by this proposed change by reducing the

1 place of use by 1.9 acres and growing the historic crop on those 9 acres. (Department file,
2 testimony of Gary Evans)

3 18. Applicant has diverted 25 MI (280.5 gpm) into the Mill Ditch at the headgate on Tin Cup
4 Creek and diverted 17 MI (189 gpm) from Mill Ditch for use on their current nine irrigated acres
5 since 2001 when the three water rights were purchased from the Wildeys. The difference (8 MI)
6 is the ditch loss between the headgate on Tin Cup Creek for Mill Ditch and Applicant's
7 secondary point of diversion (pump) on Mill Ditch. The total flow rate requested in this change
8 proceeding (after removing Water Right No. 76H 212610-00 from consideration) is 4 MI from
9 Water Right No. 76H 105194-00 and 11 MI from Water Right No. 76H 107549-00 for a total of
10 15 MI. Applicant has acquired and changed 114.68 gpm from other water rights to this place of
11 use for a total requested for this acreage of 282.98 gpm from Tin Cup Creek. (Department file;
12 testimony of Gary Evans; Exhibit Nos. A3, A12, A27; Stipulation)

13 19. The property associated with the water rights proposed for change (these three "Willey
14 Claims") have not been actively irrigated since the mid-1970s, however, the water was diverted
15 into the Mill Ditch continuously throughout this time and used by the Mill Ditch Association or
16 other Association members. (Stipulation; testimony of Gary Evans; Exhibit No. A18, page 3)

17 20. The Wildey property had irrigation ditches in use when the Wildeys moved onto the
18 property, and these water rights were used for the production of native grasses for hay and
19 grazing or drinking water for livestock. The Wildeys did not intend to abandon the water rights.
20 The Wildeys filed Water Right Claim Nos. 76H 107548-00 and 76H 107549-00 in 1981. They
21 purchased the McChesney property with Water Right Claim No. 76H 105194-00 in 1991, with
22 the Statement of Claim previously filed in 1981. The Wildeys continued to have their water rights
23 diverted down Mill Ditch, they went through the state-wide water adjudication with the intent to
24 preserve the water rights and to use the water, and they have at all times remained current in
25 their assessments for the Mill Ditch. The water rights have been in use since 2001 when the
26 Applicant acquired the property and water rights. (Department file, testimony of Sherry Wildey)

27 **Adverse Effect**

28 21. Applicant will continue to divert water into Mill Ditch from Tin Cup Creek as it was
29 historically diverted prior to the proposed change. There will be no change in the diversion.
30 Applicant is not resuming a dormant diversion of these water rights being changed if this change
31 is authorized. These water rights have been diverted each year, and the Mill Ditch Association's
32 assessment has been paid each year. Applicant has used the water as requested in this change

1 application since the rights were purchased in 2001. Objector Tin Cup alleges an adverse effect
2 to their water rights because if Applicant's rights were deemed abandoned, Objector Tin Cup's
3 7th right would be useable longer because the rights being changed, 2nd rights, would be
4 smaller. The alleged effect here is not from the proposed change, but from the rights not being
5 determined to be abandoned. Objector will receive the same water if this proposed change is
6 allowed as they did before it was proposed. (Testimony of Gary Evans, Sherry Wildey, Tex
7 Marsolek)

8 **Adequacy of Appropriation Works**

9 22. The water has been diverted into Mill Ditch, and the water has been used by the
10 Applicant from a secondary point of diversion on Mill Ditch by an existing pump and mainline
11 already in use with other water rights belonging to the Applicant since 2001. Applicant's pump is
12 designed by an irrigation supply company to pump sufficient water to irrigate the nine acres in
13 2.5 days at a maximum pump efficiency of 189 gpm. Applicant can operate their pump at less
14 than maximum efficiency, at times when 17 MI (189 gpm) is not available at their secondary
15 point of diversion for their use. The appropriation works are adequate to provide the requested
16 and smaller flows. (Department file, testimony of Gary Evans)

17 **Beneficial Use**

18 23. Applicant's reason for purchasing more water than what their pump can handle is that in
19 most cases water users do not include any ditch loss in their calculations. Applicant realizes that
20 the water right flows are measured at the headgate and not at the field. Applicant has
21 purchased water from subdivisions in the town of Darby or other properties to make up the ditch
22 loss not included in the water rights as claimed. Thus, Applicant has purchased these three
23 additional water rights to increase water available for conveyance losses in the three miles of
24 ditch used to carry Applicant's water to their secondary pump site on the Mill Ditch, to allow
25 irrigation to be completed in 2.5 days, and to run their pump at its maximum efficiency of 189
26 gpm. Applicant currently diverts 25 MI from Tin Cup Creek into Mill Ditch. Applicant currently
27 diverts 17 MI (189 gpm) from Mill Ditch to irrigate their nine irrigated acres. Applicant's irrigation
28 system was designed by a local irrigation supply company. (Department file, testimony of Gary
29 Evans, Exhibit No. A18)

30 24. The amount remaining after the withdrawal of Water Right Claim No. 76H 212610-00
31 from the proposed change is 15 MI or 168.3 gpm. Applicant has other water rights appurtenant
32 to the proposed place of use. Some water rights are junior in priority to the water rights

proposed for change in this matter and will be in priority for a shorter time period. The proposed use of these water rights is for sprinkler irrigation of native grasses for hay and grazing on Applicant's property to be applied in 5 twelve-hour sets to fully irrigate their property in 2.5 days of each 7 day week. Of the 282.98 gpm available from Applicant's rights to be diverted into Mill Ditch at the headgate, Applicant diverts 189 gpm onto the acreage for 50 days of each irrigation season. Fifty days at 189 gpm equals 41.76 acre-feet⁸. The balance is carriage water (or ditch loss) to get the 189 gpm to Applicant's pump site on the Mill Ditch. (Department file, Testimony of Gary Evans, Exhibit No. A22)

25. Applicant stated at hearing that the stock water right has not been and will not be used as requested in the change application. Stock water will be provided from Applicant's existing ground water well. There will be no beneficial use of the stock water as proposed in this Application. (Testimony of Gary Evans)

Possessory Interest

26. Applicant has affirmed that they have a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use. No party contested this issue. (Department file)

Water Quality Issues

27. No valid objections relative to water quality were filed against this Application. The water quality of a prior appropriator will not be adversely affected by this proposed change. (Department file)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

General

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402.

2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or

⁸ (189 gpm * 1440 min/d * 50 d) / 325851 g / af ≈ 41.76 af

1 developments for which a permit or certificate has been issued or for which a state water
2 reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. §
3 85-2-436, a temporary change authorization for instream use to benefit the fishery resource
4 pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439
5 when authorization does not require appropriation works, the proposed means of diversion,
6 construction and operation of the appropriation works are adequate; the proposed use of water
7 is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or
8 a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann.
9 § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory
10 interest, or the written consent of the person with the possessory interest, in the property where
11 the water is to be put to beneficial use; if the change in appropriation right involves salvaged
12 water, the proposed water-saving methods will salvage at least the amount of water asserted by
13 the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not
14 be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of
15 a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

16 3. A public notice containing the facts pertinent to the change application must be
17 published once in a newspaper of general circulation in the area of the source and mailed to
18 certain individuals and entities. Mont. Code Ann. § 85-2-307. See Finding of Fact No. 2.

19 Applicant modified its Application to withdraw Water Right Claim No. 76H 212610-00 for
20 this Application. Modifications to an application may be considered in a proceeding publicly
21 noticed so long as other appropriators are not prejudiced, regardless of whether the other
22 appropriators are parties to the case. If the proposed modification to the application suggests an
23 increase in the burden on the source beyond that identified in the notification of the application
24 as originally proposed, that could cause prejudice. Lack of complete notice means that persons
25 potentially affected by the change could be given insufficient information to determine the
26 likelihood of whether they would be adversely affected. (See In the Matter of the Application for
27 Beneficial Water Use Permit 76161-s76G by Ed Janney, Proposal for Decision (1992); In the
28 Matter of the Application for Beneficial Water Use Permit No. 24591-q41H by Kenyon-Noble
29 Ready Mix Co., Proposal for Decision (1981).)

30 Here, the modified application is a subset of the original application. Therefore, parties to
31 the case are not prejudiced. The modification does not increase the burden on the source
32 beyond that identified in the public notice; therefore, other appropriators are not prejudiced. See
33 Findings of Fact No. 4.

1 Historic Use

2 4. In a change proceeding, it must be emphasized that other appropriators have a vested
3 right to have the stream conditions maintained substantially as they existed at the time of their
4 appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert
5 E. Beck, 2 Waters and Water Rights § 16.02(b) (1991 edition); W. Hutchins, Selected Problems
6 in the Law of Water Rights in the West 378 (1942). Montana's change statute simply codifies
7 western water law.⁹ One commentator describes the general requirements in change
8 proceedings as follows:

9 Perhaps the most common issue in a reallocation dispute is whether other
10 appropriators, especially junior appropriators, will be injured because of an increase
11 in the consumptive use of water. Consumptive use may be defined as "diversions
12 less returns, the difference being the amount of water physically removed (depleted)
13 from the stream system through evapotranspiration by irrigated crops or consumed
14 by industrial processes, manufacturing, power generation or municipal use." An
15 appropriator may not increase, through reallocation [changes] or otherwise, the
16 historic *consumptive* use of water to the injury of other appropriators. *In general, any*
17 *act that increases the quantity of water taken from and not returned to the source of*
18 *supply constitutes an increase in historic consumptive use.* As a limitation on the
19 right of reallocation, historic consumptive use is an application of the principle that
20 appropriators have a vested right to the continuation of stream conditions as they
21 existed at the time of their initial appropriations.
22

23 Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78 (italics added).

24 The DNRC in administrative rulings has held that a water right in a change proceeding is
25 defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of
26 Application for Change Authorization No. 157350-76H by Neil and Virginia Miller (1985); In the
27 Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer,
28 December 13, 1991, Final Order; In the Matter of Application for Change Authorization No.
29 G(W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order. Here, the actual historical
30 beneficial use occurred long ago. However, the record shows that irrigation did in fact take place
31 in the amount of one miner's inch per claimed acre, and that the water rights have been used by
32 the Applicant since 2001 on the proposed place of use. See Finding of Fact Nos. 12, 13, 14, 15,
33 16, 17, 18, 19, 20.

34 5. The water rights being changed have not been used between 1976 and 2001, the time
35 the previous owner the Wildeys owned the rights, until 2001 when the Applicants purchased the

⁹ Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104.

1 water rights and began using them on their property. However, there is evidence of prior use of
2 the rights on the Wildey property. During the Wildey ownership, the Mill Ditch assessments were
3 continuously paid, and the water was continuously diverted into the Mill Ditch; however, the
4 Wildeys did not beneficially use the water. What specifically happened to the diverted water
5 when the Wildeys owned the water rights is not known, other than Objector Tin Cup Water
6 and/or Sewer District was not able to use the water because it was being diverted into the Mill
7 Ditch for use by other Mill Ditch Association members. See Finding of Fact Nos. 13, 14, 16, 18,
8 19, 20.

9 6. Applicant will irrigate an identical crop in proximity to the location of the original crop
10 claimed under Water Right Claim Nos. 76H 105194-00 and 76H 107549-00. Applicant will
11 reduce the acreage irrigated from 10.9 acres to 9 acres and thereby reduce consumptive use.
12 Although the Department is not bound by Water Right Claims in the Water Court in a change
13 proceeding, i.e. the Department is not required to authorize a change of the total Water Right
14 Claim, the Hearing Examiner finds that the evidence submitted to the Water Court with those
15 claims (copy of the portion of the Decree) supports historic consumptive use. See In the Matter
16 of Application for Change Authorization No. 30542 by Edmund and Loretta Walton, Final Order
17 (1982). Objectors presented no evidence that historic consumption under the rights proposed
18 for change would increase. The water rights proposed for change have historically been
19 diverted in the amounts proposed for change. Although Applicant has provided minimal
20 evidence on actual historic use, I find that evidence credible. See Finding of Fact Nos. 13, 14,
21 15, 16, 17, 18, 19, 20.

22 **Adverse Effect**

23 7. The Applicant has proven by a preponderance of the evidence that the water rights of
24 other appropriators under existing water rights, certificates, permits, or state reservations will not
25 be adversely affected. In water right change proceedings, adverse effect from alleged
26 abandonment could come from the resumption of use of water rights not currently used or of
27 abandoned water rights. Objectors argue that these water rights should be presumed
28 abandoned because they have not been used since the 1970's through 2001 when Applicant
29 began using the water.

30 This Hearing Examiner is without jurisdiction to determine whether a water right has
31 been abandoned. That authority lies with a Montana district court or Montana Water Court. E.g.,
32 In the Matter of Application of Change in Appropriation Water Right No. 118495-76M by Stone

1 Container Corporation (1992); see also Mont. Code Ann. Title 3, Chapter 7, § 85-2-216, and
2 §85-2-309(2). It is true that the Hearing Examiner or Department will consider the issue of
3 abandonment in a change proceeding under adverse effect. If the Applicant fails to prove an
4 actual water right, the Department is not required to authorize a change in appropriation.
5 Authorizing a change in a “paper right” can adversely affect other appropriators by allowing
6 resumption of a water use which was previously abandoned and the water for which has since
7 been appropriated by other users. The result may be that an applicant continues to have a claim
8 of existing use authorized by the Water Court but be denied a change in use by the Department
9 because the relevant criteria of Mont. Code Ann. §85-2-402 are not met. E.g., In the Matter of
10 Application for Beneficial Use Permit No. 51282-41Q and Application for Change in
11 Appropriation Water Right No. 139972-41Q by Ben Lund Farms, Inc. (1985); In the Matter of
12 Application for Beneficial Use Permit No. 41H-30003523 and Application for Change in
13 Appropriation Water Right No. 30000806 by Montana Golf Enterprises, LLC. (2003 Proposal for
14 Decision). In that case, the applicant continues to have the right to exercise its water right as
15 determined by the Water Court.

16 Mont. Code Ann. § 85-2-404(2) creates a statutory presumption that certain water rights
17 are presumed abandoned if they have not been used in a period of 10 successive years. This
18 statute states: “If an appropriator ceases to use all or part of an appropriation right . . . for a
19 period of 10 successive years and there was water available for use, there is a *prima facie*
20 presumption that the appropriator has abandoned the right for the part not used.” However,
21 Mont. Code Ann. § 85-2-404(5) states: “Subsections (1) and (2) do not apply to existing rights
22 until they have been finally determined in accordance with part 2 of this chapter [adjudicated
23 before the Water Court].” The Hearing Examiner does not find from the record in this matter that
24 the water rights being changed have been “finally determined” as required by Mont. Code Ann.
25 § 85-2-404(5). Therefore, there is no *prima facie* presumption of abandonment by the terms of
26 the statute.

27 Without the statutory presumption abandonment, proof is required by the person
28 claiming abandonment of intent to abandon the right by the water right holder and nonuse –
29 mere nonuse does not constitute abandonment. E.g., Best v. Rodda (1923), 68 Mont. 205, 217
30 P. 669; Thomas v. Ball (1923), 66 Mont. 161, 213 P. 597(abandonment of an appropriation of
31 water requires a concurrence of act and intent, the relinquishment of possession, and the intent
32 not to resume it for a beneficial use; burden of proof on one claiming abandonment; nonuse
33 alone is insufficient). The Department recognizes the Montana Supreme Court’s holdings since

1 the passage of the Montana Water Use Act in 1973 where evidence of a long period of non-use
2 constitutes strong evidence of abandonment and the water right holder must come forward with
3 evidence of intent not to abandon the right. E.g., 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426,
4 666 P.2d 215 (40 years - pre 1973); In the Matter of Clark Fork River Drainage Area (1992 - pre
5 1973); 254 Mont. 11, 833 P.2d 1120 (23 years); In the Matter of Clark Fork River Drainage Area
6 (1995 - pre 1973) 274 Mont. 340, 908 P.2d 1353 (50 years). The issue of abandonment in this
7 case is close one. Here, the record has no evidence presented to explain or justify why water
8 was not used for such a period of time by the Applicant's predecessors. However, actions were
9 taken by Applicant's predecessor at periodic intervals which evidence an intent not to abandon
10 the water. Claims were filed in 1981. The McChesney property was purchased with Water Right
11 Claim No. 76H 105194-00 in 1991. The Wildeys pursued the Water Right Claims through the
12 Water Court and participated actively in settling Tin Cup's objections in 1997 to Water Right
13 Claims Nos. 76H 107548-00 and 76H 107549-00. At all times, Applicant's predecessors
14 continued to have water under these claims diverted through the Mill Ditch. Even though the
15 Wildeys did not use the water, it was diverted into Mill Ditch and they took steps to assure the
16 water rights were not statutorily presumed abandoned and Mill Ditch assessments were paid.
17 See Mont. Code Ann. § 85-2-226, Exhibit No. A27. See also In the Matter of Application to
18 Change Appropriation Water Right No. 190495-41A by the United States Fish and Wildlife
19 Service (1989)(30 years insufficient to raise abandonment). The water has continuously been
20 diverted from Tin Cup Creek, thus, removing the water from use by other Tin Cup Creek
21 appropriators except those served by the Mill Ditch Association.¹⁰ Objector did not offer any
22 proof of the Wildeys' intent to abandon the rights in question or request certification of that issue
23 to the Water Court. Mont. Code Ann. §85-2-309(2). I do not find an intent to abandon the water
24 rights.

25 Objectors argue that approving this change will result in use of previously abandoned
26 water rights and such approval constitutes adverse impact on all existing water users on the
27 source. The adverse effect alleged by Objector Tin Cup comes from the **lack of a court**
28 **determination that the water rights have been abandoned**, not from the proposed changes.
29 Nothing will change on the ground for Objectors if this authorization is granted. There is no
30 resumption of diversion from the Tin Cup Creek of this water. Here, the stream conditions will

¹⁰ The Department in no way condones the unauthorized use of water. However, one must be allowed the opportunity to come into compliance with the law and use the water on an authorized place of use. In this case, the Department finds that the water rights have not been abandoned, although the issue is a close one.

not change from what they were prior to the proposed change. The Applicant has shown an intent to use the water rights being changed (lack of intent to abandon). Under Applicant's proposed changes, the water rights of prior appropriators will continue to be satisfied as they always have. Mont. Code Ann. § 85-2-402(2) only requires that an appropriator not be adversely affected by the proposed change – not that rights not in use be considered abandoned. The water rights of other Tin Cup Creek appropriators will not be adversely affected. Mont. Code Ann. § 85-2-402(2)(a). Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact No. 21.

Adequacy of Appropriation Works

8. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This water has historically been diverted into and carried by Mill Ditch to its historical place of use down-ditch of the Applicant's pumpsite on Mill Ditch. Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact No. 22.

Beneficial Use

9. The Applicant has proven by a preponderance of evidence that the quantity of irrigation water proposed to be moved from 3.9 acres and from 7 acres and used for 9 acres of crop irrigation, 15 MI (168.3 gpm) up to 42 acre-feet, is the amount necessary for crop irrigation but not conveyance loss from the diversion headgate to the place of use. Applicant originally applied to change 280.5 gpm (25 MI) including 8 MI for the ditch loss from the point of diversion to the place of use. The amount withdrawn from consideration by the Applicant (Water Right Claim No. 76H 212610-00), 112.2 gpm (10 MI), reduces the flow rate being changed from 280.5 gpm (25 MI) to 168.3 gpm (15 MI). Applicant is accumulating or stacking water rights to allow Applicant to adequately cover ditch losses, crop needs, and Applicant's irrigation schedule from the combination of water rights. These rights include Water Right Nos: 76H 105194-00, 76H 107549-00, 76H 108983-00, 76H 30404-01, 76H 107471-00. Any change authorization must require that the total amount diverted and applied from all rights appurtenant to these acres must be conditioned to not exceed the amount necessary for ditch loss, field efficiency, and crop requirements – shown in this record to be 280.5 gpm (25 MI) at the headgate of Mill Ditch on Tin Cup Creek and 17 MI (189 gpm) at the secondary point of diversion from Mill Ditch. Measurement of the duration and time of pumping, total flow rate, and total volume of water diverted from Mill Ditch to the place of use is necessary to assure the water applied by the combined water rights does not exceed the needs of the crop. Applicant does not intend to use

1 the stock water as proposed in the Application. Therefore, the proposed stock use is not
2 beneficial, and the stock water right No. 76H 107548-00 will not be changed. The amount of
3 0.17 acre-feet has been deducted from the amount proposed for change. Mont. Code Ann. §
4 85-2-402(2)(a). See Finding of Fact Nos. 18, 23, 24, 25.

5 **Possessory Interest**

6 10. The Applicant has proven by a preponderance of evidence they have a possessory
7 interest in the property where water is to be put to beneficial use. See Mont. Admin. R.
8 36.12.1802. Mont. Code Ann. § 85-2-402(2)(d). See Finding of Fact No. 26.

9 **Water Quality Issues**

10 11. The water quality of a prior appropriator will not be adversely affected. No valid
11 objections relative to water quality were raised. Mont. Code Ann. §§ 85-2-402(2)(f), (g). See
12 Finding of Fact Nos. 27.

13 **General**

14 12. The Department may approve a change subject to terms, conditions, restrictions, and
15 limitations it considers necessary to satisfy the criteria for authorization to change a water right.
16 Here, the total diverted amount to these 9 acres must be limited to the amount necessary for
17 ditch loss, field efficiency, and crop requirements. Mont. Code Ann. § 85-2-402(8). See
18 Conclusion of Law No. 9.

19 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the
20 Hearing Examiner makes the following:

21 **FINAL ORDER**

22 Subject to the terms, conditions, restrictions, and limitations specified below,
23 Authorization to Change A Water Right No. 76H 30012871 is hereby **GRANTED** to Gary and
24 Ramona Evans.

25 Applicant may change the place of use of Water Right Nos. 76H 105194-00 and 76H
26 107549-00 to 9 acres in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, Township 3 North, Range 21 West,
27 Ravalli County, Montana. The area, flow rate, and volume being changed for each water right is
28 as follows: 76H 105194-00, 44.88 gallons per minute (gpm), up to 12 acre-feet, on 3.9 acres for
29 irrigation; and 76H 107549-00, 123.42 gpm, up to 30 acre-feet, on 7 acres for irrigation.
30 Diversion from Tin Cup Creek into the Mill Ditch will continue at the historic point of diversion, as

1 historically diverted into the Mill Ditch and the water will be diverted from the Mill Ditch by
2 Applicant using existing pump and mainline.

3 A. This authorization is limited to the amount of the historic use stated above recognized by
4 the DNRC in this proceeding as subject to change, and will thereafter not exceed that amount. If
5 the historic use is reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part
6 2, MCA, this authorization will be limited to that lesser amount. This Order does not determine
7 or confirm the amount of water used by these water right claims on the entire places of use.

8 B. Applicant has multiple water rights associated with this place of use. The combined
9 appropriation of all water rights appurtenant to this 9 acre place of use including but not limited
10 to Water Right Nos: 76H 105194-00, 76H 107549-00, 76H 108983-00, 76H 30404-01, 76H
11 107471-00 is limited to the amount necessary for ditch loss, field efficiency, and crop
12 requirements – here 280.5 gpm (25 MI) at the headgate and 189 gpm (17MI) at the secondary
13 point of diversion from Mill Ditch.

14 C. The appropriator shall install a Department approved water use measuring device to
15 measure water diverted from Mill Ditch at a point approved by the department. Water must not
16 be diverted until the required measuring device is in place and operating. On a form provided by
17 the Department, the appropriator shall keep a written daily record of the flow rate and volume of
18 all water diverted including the period of time. Records shall be submitted by November 30th of
19 each year and upon request at other times during the year. Failure to submit reports may be
20 cause for revocation of a permit or change. The records must be sent to the Water Resources
21 Regional Office. The appropriator shall maintain the measuring device so it always operates
22 properly and measures flow rate and volume accurately.

23 NOTICE

24 This final order may be appealed by a party in accordance with the Montana
25 Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the
26 appropriate court within 30 days after service of the order.

27 If a petition for judicial review is filed and a party to the proceeding elects to have a
28 written transcript prepared as part of the record of the administrative hearing for certification to
29 the reviewing district court, the requesting party must make arrangements for preparation of the
30 written transcript. If no request is made, the Department will transmit only a copy of the audio
31 recording of the oral proceedings to the district court.

1 Dated this 28th day of December 2007.

2
3 / Original Signed By Charles F Brasen /

4 Charles F Brasen
5 Hearing Officer
6 Water Resources Division
7 Department of Natural Resources
8 and Conservation
9 PO Box 201601
10 Helena, Montana 59620-1601

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RECEIVED

APR 26 2007

MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
HEARINGS UNIT

Received at hearing CB

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF THE APPLICATION)
NO. 76H-30012871 TO CHANGE WATER)
RIGHT NOS. 76H-105194, 76H-107548,)
76H-107549, AND 76H-212610, BY GARY)

PRE-HEARING STIPULATION TO UNDISPUTED FACTS

Applicants Gary Evans and Ramona Evans and Objector Tin Cup Water and/or
Sewer District hereby stipulate that the following facts are not in dispute:

1. The properties associated with the three "Willey Claims" [76H-105194, 76H-107548, and 76H-107549] have not been actively irrigated since the mid-1970s.
2. In 1981, Harold McChesney filed a Statement of Claim for decreed water from Tin Cup Creek for 3.90 irrigated acres, 4 miner's inches, using Mill Ditch. Wileys purchased that property from McChesney, along with associated rights (76H-105194), in 1991.
3. An acknowledgment of water right transfer for that claim was filed in December, 1991.
4. Water associated with Claim No. No. 76H-105194 continues to

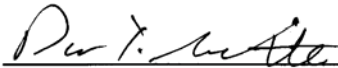
1

be diverted through Mill Ditch to this day.

5. The Wildeys also owned property and associated stock water and irrigation rights as shown on Claim Nos. 76H 107548 & 107549. The water associated with such claims continues to be diverted through Mill Ditch to this day.
6. During the adjudication process in 1995, no objection was filed for Claim No. 76H-105194, and the claim was approved as shown on the Statement of Claim.
7. Tin Cup filed objections to Claim Nos. 76H 107548 & 107549 on numerous grounds, including on the grounds of abandonment.
8. Following a second status conference conducted in Case No. 76HE-232 (76H 197549) in July 1997, Tin Cup agreed to withdraw its objections and for entry of judgment confirming Claim No. 76H 107549, provided that maximum acreage be reduced from 11 to 7 acres. An order adopting the Water Master's Report on the terms agreed to by Tin Cup was filed on July 31, 1997.

Dated this 26th day of April, 2007.

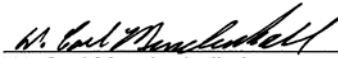
MARKETTE LAW OFFICE



David T. Markette, Attorney for Applicants

Dated this 26th day of April, 2007.

WORDEN, THANE P.C.



W. Carl Mendenhall, Attorney for Objector
Tin Cup Water and/or Sewer District

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 28th day of December 2007 by first-class United States mail

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/ Original Signed By Jamie Price /

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